To: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Susan C. Bucklew, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **May 20, 2006 (revised July 20, 2006)**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 3-4, 2006, in Washington, D.C. and took action on a number of proposed amendments to the Rules of Criminal Procedure.

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This report addresses a number of action items [, which include] approval of proposed amendments to Rules 29 and 41 for publication and comment[.]

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IV. Action Items–Recommendations to Publish Amendments to the Rules

1. Rule 29, Motion for a Judgment of Acquittal; Proposed Amendment Concerning Deferral of Rulings.

At present, Rule 29 permits the court to grant a preverdict acquittal that is insulated from appellate review because of the Double Jeopardy Clause. By a narrow vote of 6-5 the Committee

voted to recommend publication of an amendment to Rule 29 that would eliminate such unreviewable rulings. The current proposal has an unusually long history that this report will review briefly before turning to recent developments.

Background. For several years the Department of Justice has pressed for an amendment to Rule 29 on the ground that it is anomalous and highly undesirable to insulate erroneous preverdict acquittals from any appeal. This issue has been discussed at numerous meetings of the Advisory Committee, and was brought by the Department directly to the Standing Committee at the January 2005 meeting.

At present, the rule permits the court to grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

After extensive discussion at several meetings, the Advisory Committee voted in May 2004 to leave the rule as it is because of concerns that the proposed amendment would be problematic in cases involving multiple defendants or multiple counts, as well as cases in which the jury is unable to reach a verdict. At that point, the Advisory Committee was under the impression there had been only a very small number of problematic preverdict acquittals under the present rule.

Subsequently, the Department of Justice developed additional information based upon a survey of all United States Attorneys. This information was intended to show the frequency of preverdict acquittals, and selected case studies were presented to show the impact erroneous and unreviewable preverdict acquittals have had on the administration of justice. Assistant Attorney General Christopher Wray presented the new information at the January 2005 meeting of the Standing Committee and strongly advocated the adoption of an amendment to Rule 29 that would provide the government with some means to appeal erroneous acquittals. He stated that the Department would support either a rule requiring that all judgments of acquittal be deferred until the jury has returned a verdict, or a rule that would defer such a ruling unless the defendant waives the Double Jeopardy rights that would normally bar the government from appealing.

Following this presentation, the Standing Committee asked the Advisory Committee to draft

an amendment to Rule 29 that would address the concerns raised by the Department of Justice, as well as those concerning hung juries and cases involving multiple counts and multiple defendants, and to advise the Standing Committee on the desirability of adopting such an amendment.

At its April 2005 meeting the Advisory Committee once again considered the desirability and feasibility of amending Rule 29. The Committee was presented with the additional materials prepared by the Department of Justice for the Standing Committee, and Assistant Attorney General Christopher Wray presented the Department's position. After extensive discussion, the Committee voted 8 to 3 in favor of some change to Rule 29. However, many issues were raised regarding the rough draft under consideration (which allowed a defendant to consent to a preverdict ruling if he also waived his Double Jeopardy rights). Committee members felt that substantial revisions in the proposed amendment would be necessary. The proposed amendment was redrafted and subsequent versions were presented and discussed at the Committee's meetings in October 2005 and April 2006.

The current proposal. The Committee considered but ultimately rejected the option of prohibiting preverdict acquittals, because they serve a number of important functions. They provide the trial court with a valuable case-management tool, especially in complex cases involving a large number of defendants and/or counts. In complex cases it is very helpful to be able to simplify the case by eliminating some defendant(s) or count(s) from the jury's consideration if there is no evidence that could support a conviction. Retaining the option of preverdict acquittals is also highly desirable from the defense perspective, since there are obvious costs to continued participation in the latter stages of what may be a lengthy and costly trial.

The amendment addresses the problem by retaining the option of preverdict acquittals, but allowing them only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. The amended rule seeks to protect both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous judgments of acquittal. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and/or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts).

The 6-5 vote on the Committee reflects serious reservations regarding the merits of the proposed amendment, rather than concerns about the language or form of the amendment. Indeed the language of the amendment, which has been refined over the course of numerous meetings, was approved without objection by the Committee at the April 2006 meeting. The discussion at the

Committee focused on the policy issues. Members of the Committee who opposed the amendment saw it as inconsistent with the public policy underlying the Double Jeopardy Clause and as unduly restricting the trial court's authority. They were not persuaded that erroneous preverdict acquittals have been a sufficient problem to warrant such a restriction of constitutional rights and judicial authority. Additionally, since the rule contemplates a government appeal from a preverdict acquittal, they expressed concern that government appeals could create new problems, complicating the continuation of the trial of related counts or defendants, or possibly denying the district courts of jurisdiction to continue such trials.

After hearing the Department's presentation in January 2005 the Standing Committee asked the Advisory Committee to draft an amendment that would respond to the Department's concerns and to advise the Standing Committee on the desirability of adopting such an amendment. The attached proposal reflects a consensus on the best way to amend Rule 29 if preverdict acquittals are to be restricted to allow the government to challenge them on appeal. The Committee, however, is divided nearly evenly on the desirability of such an amendment at the present time.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 29 be published for public comment.

2. Rule 41, Search and Seizure; Proposed Amendment Authorizing Magistrate Judge to Issue Warrants for Property Outside of the United States.

This amendment was initiated by the Department of Justice. It responds to a problem that the Department has encountered when federal prosecutors work with the State Department Bureau of Diplomatic Security to investigate and prosecute cases involving corruption in United States embassies and consulates around the world. Many cases involved allegations that corrupt consular officials and/or foreign service nationals are selling U.S. visas to foreign individuals who may or may not qualify for a U.S. visa. These crimes take place overseas, and often the most important evidence is located in the offices or residences associated with the consulate or embassy. These problems have arisen in cases involving embassies and consulates in many countries and in American Samoa, a United States territory that is administered by the Department of the Interior but has no federal district court. Although these locations are within U.S. control, they are not located within any State or U.S. judicial district.

As currently written, Rule 41(b) does not provide magistrate judges with the authority to issue warrants for such locations. *See, e.g., United States v. Wharton*, 153 F. Supp. 2d 878, 882 (W.D. La. 2001) ("clearly, Rule 41 did not empower any United States District Court to issue a search warrant for the defendant's property when it was located at the United States Embassy in Port-au-Prince, Haiti.") Although the USA PATRIOT Act amended Rule 41(b) to provide magistrate judges with the authority to issue warrants outside the magistrate's district, this authority is applicable only in cases involving certain terrorism offenses. *See* Rule 41(b)(3).

The language of the proposed amendment was based upon Rule 41(b)(3), which was added by the USA PATRIOT Act, and upon the definition of the special maritime and territorial jurisdiction of the United States contained in 18 U.S.C. § 7, which includes U.S. consulates and embassies. The proposed amendment provides for jurisdiction in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which is the default jurisdiction for venue under 18 U.S.C. § 3238.

A similar but broader amendment was approved in 1990 by the United States Judicial Conference, which recommended that the Supreme Court adopt the new rule. The Supreme Court declined to adopt the rule at that time, concluding that the matter required "further consideration." The 1990 proposal was broadly worded: it applied to property "lawfully subject to search and seizure by the United States." The current proposal, however, is limited to property within any of the following:

> (1) a territory, possession, or commonwealth of the United States;
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> (2) the premises of a United States diplomatic or consular mission in a foreign state, and the buildings, parts of buildings, and land appurtenant or ancillary thereto, used for purposes of the mission, irrespective of ownership; or
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> (3) residences, and the land appurtenant or ancillary thereto, owned or leased by the United States, and used by United States personnel assigned to United States diplomatic or consular missions in foreign states.

These are all locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control.

The Committee was advised by the Department of Justice that the proposed amendment had

been subject to extensive review by agencies such as the Department of State and the Office of Management and Budget. Its scope was deliberately kept narrow to avoid any thorny international issues. It addresses search warrants, not arrest warrants, since the latter may raise issues under extradition treaties.

The Department's presentation regarding the need for an amendment was persuasive. The Committee discussion focused on the means of providing the requested authority. One question was whether the Department should seek legislation rather than an amendment of the rules. Because the issues involved only forum, and not jurisdiction, the Department believed it was appropriate to come first to the Rules Committee. The magistrate judge member of the Committee expressed some concern that the proposal might unintentionally create a hierarchy or distinction among federal magistrate judges, by giving greater authority to the three magistrate judges seated in the District of Columbia. It was noted, however, that Congress has already created a functional distinction by vesting the District of Columbia with default jurisdiction over several categories of international and extraterritorial matters.

The Committee voted 10-1 to approve the amendment to Rule 41(b). Because no committee note had yet been prepared, the Committee agreed to consider and vote on the note by e-mail. On May 12, the draft note was circulated for comment. No member of the Committee requested changes or a telephone conference, so the Committee was asked to vote on the Committee Note by e-mail. All members of the Committee approved the Note by e-mail.

Bracketed language excepting American Samoa was added to address concerns, expressed by the Ninth Circuit Court of Appeals Pacific Islands Committee, regarding the desirability of applying the amendment to the unique situation in American Samoa. The inclusion of the bracketed language is intended to elicit public comment on this issue.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41(b) be published for public comment.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 29. Motion for a Judgment of Acquittal

(a) Time for a Motion.

(1) ***Before Submission to the Jury***. After the government closes its evidence or after the close of all the evidence, ~~the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.~~ a defendant may move for a judgment of

*New material is underlined; matter to be omitted is lined through.

acquittal on any offense. The court may invite the motion.

(2) ***After a Guilty Verdict or a Jury's Discharge.*** A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later. A defendant may make the motion even without having made it before the court submitted the case to the jury.

(b) Ruling on a Motion Made Before Verdict. If a defendant moves for a judgment of acquittal before the jury reaches a verdict (or after the court discharges the jury before verdict), the following procedures apply:

(1) ***Denying Motion or Reserving Decision.*** The court may deny the motion or may reserve decision on the motion until after a verdict. If the court reserves decision, it must decide the motion on the

basis of the evidence at the time the ruling was reserved. The court must set aside a guilty verdict and enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction.

(2) ***Granting Motion; Waiver.*** The court may not grant the motion before the jury returns a verdict (or before the verdict in any retrial in the case of discharge) unless:

(A) the court informs the defendant personally in open court and determines that the defendant understands that:

(i) the court can grant the motion before the verdict only if the defendant agrees that the government can appeal that ruling; and

(ii) if that ruling is reversed, the defendant could be retried; and

(B) the defendant in open court personally waives the right to prevent the government from appealing a judgment of acquittal (and retrying the defendant on the offense) for any offense for which the court grants a judgment of acquittal before the verdict.

(c) Ruling on a Motion Made After Verdict. If a defendant moves for a judgment of acquittal after the jury has returned a guilty verdict, the court must set aside the verdict and enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction.

~~**(b) Reserving Decision.** The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the~~

jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict or Discharge.

(1) ***Time for a Motion.*** A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) ***Ruling on the Motion.*** If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) ***No Prior Motion Required.*** A defendant is not required to move for a judgment of acquittal before

~~the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.~~

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COMMITTEE NOTE

Subdivisions (a), (b), and (c) The purpose of the amendment is to allow the government to seek appellate review of any judgment of acquittal. At present, the rule permits the court to grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

The amendment permits preverdict acquittals, but only when accompanied by a waiver by the defendant that permits the government to appeal and — if the appeal is successful — on remand to try its case against the defendant. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts). Following the usage in other rules, the amendment uses the terms "offense" and "offenses," rather than count or counts.

The amended rule protects both a defendant's interest in holding the government to its burden of proof and the government's

interest in appealing erroneous judgments of acquittal, while ensuring that the court will only have to consider the motion once. Although the change has required some reorganization of the subdivisions, no substantive change is intended other than the limitation on preverdict rulings and the new waiver provision.

Subdivision (a). Amended Rule 29(a), which states the times at which a motion for judgment of acquittal may be made, combines provisions formerly in subdivisions (a) and (c)(1). No change is intended except that the court may not grant the motion before verdict without a waiver by the defendant.

The amended rule omits the statement in Rule 29(a) that: "If the defendant moves for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so." The Committee concluded that this language was no longer necessary. It referred to a practice in some courts, no longer followed, of requiring a defendant to "reserve" the right to present a defense when making a Rule 29 motion. There is no reason to require such a reservation under the amended rule.

Subdivision (b). Amended Rule 29(b) sets forth the procedures for motions for a judgment of acquittal made before the jury reaches a verdict or is discharged without reaching a verdict. (There is, of course, no need to rule if a not guilty verdict is returned.) Prior to verdict, the Rule authorizes the court to deny the motion or reserve decision, but the court may not grant the motion absent a defendant's waiver of Double Jeopardy rights. *See Carlisle v. United States*, 517 U.S. 416, 420-33 (1996) (holding that trial court did not have authority to grant an untimely motion for judgment of acquittal under Rule 29).

Accordingly, if the defendant moves for a judgment of acquittal at the close of the government's evidence or the close of all the evidence, in the absence of a waiver the court has two options: it may deny the motion or proceed with trial, submit the case to the jury, and reserve its decision until after a guilty verdict is returned. As under the prior Rule, if the defendant made the motion at the close of the government's evidence, the court must grant the motion if the evidence presented in the government's case is insufficient, *see Jackson v. Virginia*, 443 U.S. 307 (1979), even if evidence in the whole trial is sufficient. If the government successfully appeals, the guilty verdict can be reinstated. *Cf. United States v. Morrison*, 429 U.S. 1 (1976) (holding that Double Jeopardy does not preclude appeal from judgment of acquittal entered after guilty verdict in bench trial, because verdict can be reinstated upon remand).

Similarly, if the defendant moves for a judgment of acquittal after the jury is discharged and the government wishes to retry the case, absent a waiver the court has two options. It may deny the motion, or it may reserve decision, proceed with the retrial, submit the case to the new jury, and rule on the reserved motion if there is a guilty verdict after the retrial. *See Richardson v. United States*, 468 U.S. 317, 324 (1984) ("a retrial following a 'hung jury' does not violate the Double Jeopardy Clause"). After the second trial, the court must grant the motion if the evidence presented at the first trial was insufficient when the motion was made, even if the evidence in the retrial was sufficient. This procedure permits the government to appeal, because the verdict at the second trial can be reinstated if the appellate court rules that the judgment of acquittal was erroneous.

The court may grant a Rule 29 motion for acquittal before verdict only as provided in subdivision (b)(2), the waiver provision. Under amended Rule 29(b)(2), the court may rule on the motion for judgment of acquittal before the verdict with regard to some or all of the counts, after first advising the defendant in open court of the

requirement of the Rule and the protections of the Double Jeopardy Clause, and after the defendant waives those protections on the record. Although the focus of the rule is on the waiver of the defendant's Double Jeopardy rights, the rule does not refer explicitly to Double Jeopardy. Instead, it puts the waiver in terms a lay defendant can most readily understand: the defendant's waiver allows the government to appeal a judgment of acquittal, and to retry him if that appeal is successful.

As with any constitutional right, the waiver of Double Jeopardy rights must be knowing, intelligent, and voluntary. *See generally Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must be shown to have been done with awareness of its consequences"). Although there are cases holding that a defendant's action or inaction can waive Double Jeopardy, the Committee believed that it was appropriate for the Rule to require waiver both under the rule and explicitly on the record. *See United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (when consent order did not specifically waive Double Jeopardy rights, no waiver occurred); *Morgan*, 51 F.3d at 1110 (civil settlement with government did not waive Double Jeopardy defense when settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation). For a case holding that a defendant may waive his Double Jeopardy rights to allow the government to appeal, see *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986), *appeal after remand*, *United States v. Kington*, 835 F.2d 106 (5th Cir. 1988).

Before the court may accept a waiver, it must address the defendant in open court, as required by subdivision (b)(2). A general model for this procedure is found in Rule 11(b), which provides for a plea colloquy that is intended to insure that the defendant is knowingly, voluntarily, and intelligently waiving a number of constitutional rights.

Subdivision (c). The amended subdivision applies to cases in which the court rules on a motion made after a guilty verdict. This was covered by subdivision (c)(2) prior to the amendment. The amended rule restates the applicable standard, using the same terminology as former subdivision (a)(1). No change is intended.

Rule 41. Search and Seizure

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(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

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(5) a magistrate judge having authority in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any State or district, but within any of the following:

(A) a territory, possession, or commonwealth of the United States[,except American Samoa];[**]

(B) the premises of a United States diplomatic or consular mission in a foreign state, and the buildings, parts of buildings, and land appurtenant or ancillary thereto, used for purposes of the mission, irrespective of ownership; or

(C) residences, and the land appurtenant or ancillary thereto, owned or leased by the United States, and used by United States personnel assigned to United States diplomatic or consular missions in foreign states.

[**]The advisory committee is interested in receiving comment on whether to retain the language in brackets.

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COMMITTEE NOTE

Subdivision (b)(5). Rule 41(b)(5) authorizes a magistrate judge to issue a search warrant for property located within certain delineated parts of United States jurisdiction that are outside of any State or any federal judicial district. The locations covered by the rule include United States territories, possessions, and commonwealths not within a federal judicial district as well as certain premises associated with United States diplomatic and consular missions. These are locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. Under the rule, a warrant may be issued by a magistrate judge in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which serves as the default district for venue under 18 U.S.C. § 3238.

Rule 41(b)(5) provides the authority to issue warrants for the seizure of property in the designated locations when law enforcement officials are required or find it desirable to obtain such warrants. The Committee takes no position on the question whether the Constitution requires a warrant for searches covered by the rule, or whether any international agreements, treaties, or laws of a foreign nation might be applicable. The rule does not address warrants for persons, which could be viewed as inconsistent with extradition requirements.